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IN THE

# Supreme Court of the United States.

*No. 1170.*

JOHN H. REAGAN ET AL., APPELLANTS,

*vs.*

THE FARMERS' LOAN AND TRUST COMPANY AND THE GULF, COLORADO AND SANTA FE RAILROAD COMPANY, APPELLEES.

APPEAL FROM THE CIRCUIT COURT FOR THE WESTERN DISTRICT OF TEXAS.

## BRIEF FOR APPELLANTS.

C. A. CULBERSON,
H. C. COKE,
W. S. SIMKINS,
*For Appellants.*

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

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## STATEMENT OF THE CASE.

Except in the allegations of loss in revenue through the operation of the commission rates this case does not differ materially from that of the *International*. On this subject it is alleged in the bills, speaking generally, that the revenue earned and which may be earned under the rates established by the commission is not sufficient to pay operating expenses, fixed charges, and dividend on stock.

Only such questions will be considered here as were not discussed in the brief and printed arguments in the *International* case.

I.

With reference to the contention that the act of February 7, 1853, constitutes an irrepealable contract between the State of Texas and the Gulf, Colorado and Santa Fé Railroad Company, it seems to us sufficient to call attention to section 16 of the charter of this company, incorporated in the bill, where it is provided—

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lect such rates of freight and such rates of passage as may be just and proper: *Provided*, however, such charges do not exceed those that may be established by law; and the right is expressly reserved to the legislature to fix the rate of charges for freight and passage on said railroad by any general law."

This provision is plainly inconsistent with the act of 1853, distinctly limiting the rate not to 12 per cent. on the capital stock, but to what the legislature may from time to time prescribe, and expressly reserving the right to do this by general law.

R. R. Co. *vs.* Miller, 132 U. S., 75.

R. R. Co. *vs.* Minnesota, 134 U. S., 454.

II

While the reports of the company, made part of the bill, purport to show a deficit in 1891 of $797,746.81 and in 1892 of $1,212,522.69, they do not show that the rates established by the commission produced this result. Many companies, by reason of competitive conditions and the fact that the roads are constructed in a territory where the traffic is insufficient, do not earn revenue adequate to pay expenses and interest.

2 Int. Com. Com. Rep., 388.

This may also result from extravagant management and improvident debts. But we need not resort to these self-evident considerations to sustain our view of the rates. It is apparent from these reports that the physical properties of this company were in a deplorable condition and that extraordinary sums were used for repairs and renewals. These were properly charged to operating expenses, but the important fact remains that repairs and renewals which should have been distributed over a series of years were crowded into these two.

Extraordinary amounts were also applied to construction and equipment, not a part of operating expenses proper, $1,305,393.27 in 1891 and $585,106.84 in 1892; but a still more important fact is disclosed by these reports, which, it will be remembered, are for the years ending June 30, 1891, and June 30, 1892. The first commission tariff became effective Sept. 9, 1891 (Record in 928 page 70), and consequently the commission rates could not have affected the revenue in the report for 1891. The gross earnings for 1891 were $4,785,381.52, and the net freight earnings $3,578,256.66. The gross earnings for 1892 were $5,060,538.38 and the net freight earnings $3,918,666.66, showing an increase in 1892, when the commission rates were in force, of $275,156.86 in gross earnings and $340,410 in freight earnings. When it is recalled in this connection that the commission has not established passenger rates, the fact is evident that the commission rates on freight have increased rather than diminished the revenues.

R. R. Co. *vs.* Wellman, 143 U. S., 339.

As further evidencing the lumping into operating expenses extraordinary renewals and repairs when the commission rates were in effect and on trial, attention is called to the fact that in 1891 the operating expenses were $4,077,786.66 and in 1892 $4,775,282.56, or an increase during the latter year of $697,495.90, and significantly out of proportion to the increase of business.

It is submitted that the cause should be reversed with directions to dismiss the bills.

C. A. Culberson,
H. C. Coke,
W. S. Simkins,
*For Appellants.*

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# Supreme Court of the United States.

OCTOBER TERM, 1893.

No. ~~1070~~. 1170

JOHN H. REAGAN, WILLIAM P. McLEAN, L. L. FOSTER and C. A. CULBERSON,

*Appellants,*

*against*

THE FARMERS' LOAN AND TRUST COMPANY and THE GULF, COLORADO AND SANTE FÉ RAILWAY COMPANY,

*Appellees.*

# BRIEF FOR APPELLEES.

JOHN F. DILLON,
JOHN J. McCOOK,
H. B. TURNER,
E. B. KRUTTSCHNITT,
*Of Counsel for The Farmers' Loan and Trust Co.*

GEO. R. PECK,
J. W. TERRY,
*Of Counsel for The Gulf, Colorado and Santa Fé Railway Company.*

C. G. BURGOYNE, Cor. Walker and Centre Sts., N. Y.

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OCTOBER TERM, 1893.

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JOHN H. REAGAN, WILLIAM P. MCLEAN, L. L. FOSTER and C. A. CULBERSON,
Appellants,

AGAINST

THE FARMERS' LOAN AND TRUST COMPANY and THE GULF, COLORADO AND SANTA FE RAILWAY COMPANY,
Appellees.

## BRIEF FOR APPELLEES.

### Statement.

This cause involves the same general features as Cause No. 928 on the docket of this Court, styled John H. Reagan and others, appellants, against The Farmers' Loan and Trust Company and the International and Great Northern Railroad Company, appellees.

An elaborate brief and argument has been filed in Cause No. 928 on behalf of the Trust Company, and a separate brief and argument of considerable length has been filed in Cause No. 928 on behalf of the Gulf,

Colorado and Santa Fe Railway Company, one of the appellees in this cause, as well as a separate brief and argument on behalf of the International and Great Northern Railroad Company.

This cause, under agreement of counsel and the order of the Court, is to be submitted on briefs and decided in connection with Cause No. 928.

To avoid unnecessary consumption of the Court's time, the two appellees in this cause join in this brief and refer to and adopt the briefs and arguments above mentioned to the same extent as though filed herein.

The Farmers' Loan and Trust Company of New York, trustee of the second mortgage of The Gulf, Colorado and Santa Fe Railway Company, filed its bill of complaint in the Circuit Court of the United States at Austin, in Travis County, Texas, against John H. Reagan, William P. McLean and L. L. Foster, Railroad Commissioners; C. A. Culberson, Attorney-General of the State of Texas, and The Gulf, Colorado and Santa Fe Railway Company. The allegations of the bill and the relief sought were to a large extent the same as in the bill of the same trustee in No. 928. Hence, it will not be necessary to state the averments of the bill at length, but to give such a summary thereof as may be necessary to place before the Court the facts in this particular cause.

## Facts as They Appear from the Original Bill.

The Gulf, Colorado and Santa Fe Railway Company, hereinafter called the Gulf Company, was incorporated by a special Act of the Legislature of Texas, dated May 28, 1873, Section 8 of which was amended by an act of

date February 5, 1875. The charter as so amended is incorporated in the bill.

The mileage of the road is 1,058, of which 958 miles are in the State of Texas, and 100 miles in Indian Territory. The charter of the company has been amended several times under the general law of Texas.

Under a first mortgage, in usual form, the company has issued first mortgage bonds at the rate of $12,000 per mile, aggregating $12,696,000, bearing interest at the rate of seven per cent. per annum. Under the second mortgage it has issued bonds at the rate of $8,000 per mile, aggregating $8,464,000, bearing interest at six per cent. per annum, all of which bonds were sold in good faith at the highest market price, the first mortgage bonds having been sold on an average above par, and the first and second mortgage bonds, taken together, having been sold at an average of above ninety five cents on the dollar.

Stock has been issued at the rate of $4,310 per mile; both issues of bonds amount to $20,000 per mile and the bonds and stock together aggregate only $24,310 per mile, which amount and more its railroad and property incidental thereto are reasonably worth, "and your orator verily believes it could not now be duplicated for said amount."

The same notice of June 20, 1891, was issued to the Gulf Company through the mail as in Cause No. 928, to the effect that the Commission would commence establishing rates on July 6, 1891. Shortly afterward there appeared in the newspapers of the State a statement authorized by the Commission that the Commission invited the presence of representatives of the towns and cities, Boards of Commerce and individuals who might desire to be present on July 6, 1891.

The Gulf Company did not construe said notice of June 20, 1891, as the notice provided for in the act, but supposed that it was the intention of the said Commission to have a general hearing of the representatives of the railway companies and of citizens in general as to the general condition prevailing, and in pursuance of such idea, the general freight agent and the attorney of the Gulf Company appeared at Austin on July 6, 1891, and for several days thereafter, and participated in the general discussions that were carried on by various parties before said Commission and by the members of said Commission.

That on or about the 10th day of July, 1891, the Commissioners propounded questions in writing, for the purpose of eliciting information of a general nature, to the representatives of the railroad companies present, and the meeting was then adjourned until on or about the 15th day of July, 1891, to give the said representatives an opportunity to procure the necessary data to answer such questions. That on or about the 15th day of July, 1891, the representatives of the Gulf Company and of other railroads appeared before the Commissioner and submitted answers to such questions, all of which were of a very general nature, as for instance, as to the average cost of ocean carriage, etc., and for two days general discussion was again engaged in between said Commission and various parties present.

At this time the Gulf Company submitted statements to the Commission showing its receipts, expenses and deficits since the first day of January, 1888, to May 30, 1891, substantially as herein shown, and at the same time, as well as at the previous sessions, it requested the Commission to appoint experts to examine its books in verification of such statements,

and to hear evidence or adopt any other appropriate means of ascertaining the truth of the matters stated by its representatives, and protested that no rates should be established which would effect any reduction in its revenue. That on or about the 16th day of July, 1891, the Commission dismissed the representatives of the Gulf Company and of other railways, indicating that nothing further was then required of them, and that if the Commission desired a further attendance or further hearing that they would be so notified.

That respectively on July 30, 31 and August 1, 1891, the freight agent of the Gulf Company received through the mail proposed tariffs Nos. 1, 2 and 3, with the statement from the Commission that any suggestions in regard to the same must be received respectively on August 5, 6 and 7, 1891.

The attorney of the Gulf Company telegraphed the chairman of the Commission requesting an extension of time on the hearing of such proposed tariffs for ten days, protesting that the time allowed by the Commission was not sufficient to allow the railroads of the State to procure the necessary *data* to fairly present their objections; which request was refused. Said attorney then telegraphed the chairman suggesting that if the Commission would allow such extension of ten days he would undertake to get the railway companies to agree to waive ten of the twenty days' notice which the law required to expire after the issuance of a tariff before it could take effect; which request was again denied.

The representatives of the Gulf Company, among those of other railroads, appeared before the Commission at the dates last mentioned, and presented their objections as best they could under the circumstances.

That such proceedings constituted all of the purported hearings and all of the notice or notices ever given or granted to the Gulf Company by the Commission, and that it never in any way waived any notice of any hearing required by the law.

On August 7, 1891, the Commission dismissed the representatives of the Gulf Company and of other railway companies, stating that their presence was no longer required or desired, and if the Commission desired anything further from them it would communicate with the representatives of the Gulf Company; thereupon, the representatives of the Gulf Company left, and have never since had any notice from the Commission to be present at any hearing, and have not since been present or represented at any hearing.

The first three tariffs issued by the Commission were on the commodities mentioned in such proposed tariffs. Tariff No. 1, applying on all kinds of grain, mill feed, mill stuff and hay, flour and meal, hominy and grits and salt. Tariff No. 2, on cotton, and No. 3 on lumber, laths and shingles. Tariff No. 3 was several times amended by the Commission without further notice or hearing. Tariff No. 2, without further notice or hearing, was abolished by the Commission and another tariff substituted in its place with a still further reduction in rates, effective October 12, 1891. This tariff, being No. 6, without further notice or hearing was three times amended, the amendments resulting in further reductions in revenue to the Gulf Company.

The bill then shows the issuance of further tariffs on other commodities without any notice of hearing, all involving reductions in revenue. The first amendment to the bill, filed April 30, 1892, alleges the issuance of further tariffs by the Commission without notice or

hearing, and the bill and such amendment allege the various losses that were and would be caused the Gulf Company by the enforcement of the various tariffs, amounting in the aggregate to the sum of about $400,000 per annum.

There was never any hearing of any kind before the Commission on any of the commodities on which they issued tariffs, except of the character heretofore described, which was in relation only to the commodities mentioned in the first three tariffs. That the rates fixed by the Commission, including those in tariffs 1, 2 and 3, were not fixed or established at any time or place of which the Gulf Company had notice or an opportunity to be present and heard, but to the contrary, at the sessions of the Commission on July 15 and August 7, the Commission dismissed the representatives of the Gulf Company, and their purported rates or tariffs were thereafter fixed without notice or opportunity for the Gulf Company to be heard at the time and place when and where they were fixed.

That at such purported hearings no formal or written charges were ever preferred against the Gulf Company, no witnesses were sworn and no evidence introduced. That such sessions or meetings were general in their character, every person present being allowed to take part therein. That no evidence was ever introduced before the Commission, or obtained by it which could justify it in reducing the revenue of the Gulf Company.

Though requested by the Gulf Company to do so, the Commission failed and refused to appoint experts, or to adopt any other means of investigating the financial status, revenue or resources of the Gulf Company,

or any other railway companies of the State, and failed to make any effort whatever to inform itself as to whether the conditions were such as to authorize it to make a reduction in the rates or the revenue of the railroad companies in general or the Gulf Company in particular. At the sessions of the Commission at which the Gulf Company, or any other railway companies, were represented, no evidence whatever was introduced tending to show that the then rates of the Gulf Company, or any other railroad company, were too high, or were unjust or exorbitant. If any such evidence was ever had by such Commission, the same was had when the Gulf Company was not represented, and had no opportunity to be present or to controvert the same.

That said Commission have admitted that they never acquired or were possessed of sufficient data or knowledge or information of the facts to enable them to properly make a tariff which would give the proper revenue to the Gulf Company, but that they are experimenting in tariff making at the expense of the revenue of said company. The Commission rates were promulgated by the Commission without any evidence whatever having been taken or adduced before it which showed or tended to show that such rates and charges were just, fair or reasonable.

That under the Commission Act the tariffs of the Gulf Company in effect the 10th day of June, 1891, cannot be changed without the consent of the Commission, and hence that such tariffs should be taken in connection with the rates fixed by the Commission.

That the Gulf Company has applied to the Commission to raise its rates on general merchandise to such an extent as to offset the reductions in revenue

which would be effected by the Commission tariffs if enforced, but such request has not been granted. That before any action was taken by the Commission the railway companies, including the Gulf Company protested to said Commission that they ought not to fix tariffs on particular commodities which would involve a reduction of revenue without increasing the rates on the classes or other commodities to equalize such reduction.

That the enforcement of the Commission tariffs would cause no increase in the tonnage or freight traffic which could in any degree offset the loss caused by the reduction in rates. Even if it was willing to do so it would be impracticable for the Commission to so raise the rates on the balance of commerce as to make up for the loss which would be caused by the enforcement of its tariffs already issued.

That the Gulf Company's rates prevailing on the 10th day of June, 1891, when the Commission commenced operation, with a few trifling exceptions, were reasonable, just and fair. That such rates were and are not prohibitive of the free movement of commerce, but that under such rates and higher rates prevailing in previous years there has been a constant increase in production and commerce in all the country tributary to the Gulf Company's road.

That as long as the Gulf Company is not charging more than the traffic will bear, and as long as under the Gulf Company's rates there is a free movement of the articles affected thereby, and as long as the earnings of the Gulf Company from such rates are not sufficient to pay interest on its bonds, all of which is alleged to be true, its rates are not and cannot be unreasonable or too high, and that to force their reduction

would be equivalent to giving the free use of a proportionate amount of the capital invested in its railroad to its shippers.

The only excuses ever advanced by the Commission for attempting to reduce the Gulf Company's rates were that such rates were higher than similar rates in the State of Georgia; that the Gulf Company and other railroads had received grants of land from the State of Texas; and that in the opinion of the Commission the Gulf Company's rates were too high as compared with certain interstate rates.

The bill shows that considering the difference in the cost of operation and other conditions between the State of Georgia and the State of Texas, the Gulf Company's rates were as low as those prevailing in the State of Georgia, and hence that the conditions existing in the State of Georgia furnish no excuse for attempting to reduce the Gulf Company's rates; that such interstate rates were caused by conditions (details being given) over which the Gulf Company had no control, and that the same were not harmful but, on the contrary, beneficial to the people of Texas.

That the land certificates donated by the State of Texas were of nominal value and were sold by the Gulf Company at their market prices and the proceeds used by it in paying interest on its bonds, which was the use the State contemplated would be made of the same, as it well knew that for the first few years the earnings of the Gulf Company would not be sufficient for that purpose.

The following table is extracted from the bill:

## Gulf, Colorado & Santa Fe Railway Company.

Statement Showing Results of Operations by Years Ending June 30 from July 1, 1886, to June 30, 1891.

| | 1887. | 1888. | 1889. | 1890. | 1891. | Total from July 1, 1886, to June 30, 1891—5 years. |
|---|---|---|---|---|---|---|
| Gross earnings | $2,558,051.98 | $3,213,312.07 | $3,636,393.48 | $4,409,927.67 | $4,868,613.46 | $18,686,298.66 |
| Operating expenses | 2,117,452.05 | 2,824,783.75 | 3,180,267.17 | 3,517,992.65 | 4,061,835.89 | 15,702,331.51 |
| Net earnings | $440,599.93 | $388,528.32 | $456,126.31 | $891,935.02 | $806,777.57 | $2,983,967.15 |
| Add: | | | | | | |
| Miscellaneous income | 383,750.92 | 524,081.31 | 4,279.41 | | | 912,111.64 |
| | $824,350.85 | $912,609.63 | $460,405.72 | $891,935.02 | $806,777.57 | $3,896,078.79 |
| Deduct fixed and obligatory charges: | | | | | | |
| Taxes | $79,049.42 | $54,464.64 | $81,619.17 | $90,536.55 | $99,322.46 | $404,992.24 |
| Rentals | | | 10,352.25 | 25,022.96 | 99,182.71 | 134,557.92 |
| Interest on bonds | 893,307.92 | 1,155,452.08 | 1,368,974.71 | 1,386,900.00 | 1,396,560.00 | 6,201,194.71 |
| Other charges—interest, discount, etc. | 23,272.94 | 22,492.36 | 149,945.11 | 20,624.08 | 9,459.21 | 225,793.70 |
| Total charges | $995,630.28 | $1,232,409.08 | $1,610,891.24 | $1,523,083.59 | $1,604,524.38 | $6,966,538.57 |
| Deficit | $171,279.43 | $319,799.45 | $1,150,485.52 | $631,148.57 | $797,746.81 | 3,070,459.78 |
| Improvements—old line: | | | | | | |
| Construction and equipment | $596,068.46 | $246,798.69 | $250,489.84 | $149,491.80 | $1,331,775.95 | $2,574,624.74 |
| Total deficit | $767,347.89 | $566,598.14 | $1,400,975.36 | $780,640.37 | $2,129,522.76 | $5,645,084.52 |

On June 30th, 1891, *including unpaid interest coupons*, the company owed a floating debt of $3,348,049.97 (which was largely increased at the year ending June 30th, 1892). The bill alleges in substance that the value of the Gulf Company's property consists in its being allowed to charge such rates for its services as will represent a fair remuneration on the investment. That if the Commission rates are continued in force its earnings will not be sufficient to pay interest on its first mortgage bonds, and the property of the second mortgage bondholders will be practically destroyed, as in the event of a foreclosure under the second mortgage the property of the railway company would only sell for a nominal amount, and the property of the holders of the second mortgage bonds would be thereby virtually destroyed.

By an amendment to the bill, filed March 23, 1893, it is alleged that there has been necessarily expended in cash in the construction and equipment of the Gulf Company's Railroad more than $24,310 per mile; that its railroad has, at all times, been operated as economically as practicable, and its operating expenses at all times have been as reasonable and low in amount as they could be made, and that it has not been possible to operate the road for less than it has been operated. That during the year ending June 30, 1891, there were employed twenty general officers, who received an average of $8.24 per day. Exclusive of its general officers, its employees received a general average of $1.98 per day. During the year ending June 30, 1892, there were twenty-one general officers who received an average of $8.03 per day; and, exclusive of general officers, its employees received an average of $2 per day. That at all times the company has secured

the services of officers and employees as cheaply as practicable, and employed no more than were necessary, and that the above were fair and reasonable rates of pay. That at all times all property, material and supplies of all character employed in the operation of the road have been obtained at the cheapest market prices and as low as the same could be secured, and no more has been used than was actually necessary.

Reports made under oath on forms prescribed by the Commission, showing all details, are annexed, marked Exhibits H and I.

The actual loss to the Gulf Company from the Commission rates during the time they were in effect, amounted to $343,621.60. That if all of said Commission tariffs were in effect for a year, the annual loss would exceed $475,000, and would cause an annual reduction in the net revenues of the company of, at least, the sum of $475,000.

That the tariffs of the Commission were issued by the Gulf Company under protest, such protest being printed thereon.

That the division of the Gulf Company's through rates on interstate or foreign business has exceeded, and does greatly exceed, the divisions on through rates on shipments moving between points within the State of Texas, which the Gulf Company could, or did, derive, under the rates fixed by the Commission; that is, for hauling the freight the same distance, and performing the same service, the Gulf Company received, largely, more revenue on business interchanged with State roads or on foreign business than it did, or could, receive, on business exchanged under the rates of the Commission with roads within the State, when the freight was moving between points within the State.

That the Gulf Company's interstate and foreign rates, as well as the interstate and foreign rates of all lines doing business to and from Texas, now, and at all times, have been higher, than the rates fixed for the same or corresponding distances by the Commission.

Sections 1 and 15 of the Act of 1853 are pleaded.

The cross-bill of the railway company alleges substantially all the facts alleged in the original bill, and the same amendment was filed to the cross-bill, March 23, 1893, as to the original bill.

The cross-bill further alleges that for a period of eight years the stockholders have not received any dividends or returns whatever upon their investment in stock. That the amount of stock is as stated, and it is averred that the bonds and stock were issued in the manner and for the objects prescribed and authorized by the charter. That the same represents a part of the cost of its railroad property, equipment, &c.

Substantially the same relief is asked for in the cross-bill as in the original bill.

The pleadings show that the part of the road in the Indian Territory is not a burden to the Texas line, but contributes more than its share to the support of the road, and that the company has derived all possible revenue from all sources.

## BRIEF.

### The Gulf, Colorado and Santa Fe Railway Company is protected by the Act of 1853.

This company was incorporated six years before the Act of 1853 was repealed, and a portion of its road was constructed prior to such repeal. Its legislative charter, Section 16, provides:

"That the company shall have power to charge and collect such rates of freight and such rates of passage as may be just and proper, provided, however, that such charges do not exceed those that may be established by law, and the right is expressly reserved to the Legislature to fix the rate of charges for freight and passage on said railroads by any general laws."

We submit that this section of the charter should be construed with reference to the Act of 1853, which was then the general law of the State governing railroads, and which pointed out the manner in which rates might be established by law. The Legislature already, in the Act of 1853, having prescribed the terms and conditions under which rates might be established by law, this charter provision should be read in connection with such prior act.

The fair intent of this section is that the Legislature should only regulate the rates of this particular company by general laws applicable to all railroads, and that no power was reserved to the State to establish particular rates for this company, and the Legislature being controlled in the passage of any general law applicable to all railroads by the terms of the Act of 1853, it would have to act under the same limitation in establishing rates for this road. This section of the

charter read alone, and particularly when read in connection with the Act of 1853, which was then in effect, is clearly violated by the Commission Statute, and the action of the Commission thereunder.

Section three, paragraph D, of the Commission Law, provides that the Commission may establish different rates for different railroads, and different rates for different parts of the same road. An inspection of the various tariffs issued by the Commission, which are printed in the Record in the International Case, No. 928, and by agreement are to be referred to in all the cases, will show that in each of their tariffs they excepted railroads or parts of railroads in the State from their operation—on some of the tariffs as many as eleven railroads being excepted. Rates established in this discriminatory method are not established by general laws as contemplated by Section 16 of the charter.

Again, it is submitted that under the proper construction of that section it was intended that the rates for this company may be established by laws enacted by the Legislature itself, and that no power was reserved to the Legislature therein to act through the instrumentality of a commission, certainly without acting within the limits of the Statute of 1853, which forms a part of the charter of this company, and must be read in connection with Section 16.

**It is contended by the appellants that the Act of 1853 was repealed by the Constitution of 1876.**

This should be considered with reference to the rule elsewhere stated, that implied repeals are not favored. The Constitution of 1876 merely requires the Legisla-

ture to pass laws to regulate freight and passenger tariffs; to prevent abuses, to prevent unjust discrimination and extortion in the rates of freight and passenger tariffs. There is nothing in this language that is in the slightest degree inconsistent with the Act of 1853. The Act of 1853 permitted the railways to earn twelve per cent. The Constitution of 1876, while it prescribed the legal rate of interest at eight per cent. per annum, permitted all persons by contract to charge a rate of twelve per cent. Unless there is some necessary repugnancy or inconsistency between the Constitution of 1876 and the Act of 1853, it cannot be held that the former repealed the latter.

That the bondholders are protected regardless of any power reserved to the State see G., C. & S. F. Argument in 928, pp. 16 to 25.

In his assertion that the Constitution of 1876 repeals the Act of 1853, Mr. Coke also relies on Sections 3 and 5 of Article 12 of that Constitution, but herein he omits to refer to Section 7 of the same article, which reads: "NOTHING IN THIS ARTICLE SHALL BE CONSTRUED to DIVEST OR AFFECT RIGHTS GUARANTEED by any existing grant OR STATUTE OF THIS STATE, or of the Republic of Texas." This clearly protected any company having rights under the Act of 1853.

We invite the Court to read all of Articles 10 and 12 of the Constitution of Texas of 1876, in connection with the amendment of Section 2 of Article 10 (see argument for Trust Co. in 928, p. 9), and in connection with the plank of the Democratic platform of 1888 (which we may be pardoned for introducing as the Attorney-General has inserted the one of 1890, and as it is well-known that, except during a brief period, the Democratic party has in fact been the Government of Texas), which

reads: "We favor the enactment of such laws as shall restrict the freight charges of railway and express companies so that they may only yield *a fair interest on the money actually invested in them*, and at the same time to prevent discrimination in charges against any points within the State," and in connection with the Act of the State of Texas of April 8th, 1893, being Chapter 50 of the general laws of that year (for what concern has the State or people in the amount of bonds issued, unless they may affect the charges of the railways), and we believe the Court will conclude that it has never been the expressed judgment or desire of the people of Texas, as now apparently claimed by the Attorney-General (Printed Argument in 928, pp. 86 *et seq.*), that interest on stocks and bonds issued as here alleged for full value, and hence the equivalent of the money actually invested does not constitute a proper basis of rates. In his argument in 928, page 12, Mr. Coke, referring to the Act of 1853, says "the record will disclose that the first time this question appeared in this case was, in the opinion of the Hon. Circuit Judge, rendered upon the preliminary hearing for injunction; and it is, perhaps, a pardonable suspicion that its subsequent adoption by appellees, by amendment, was but a graceful compliment to his Honor."

As the opinion of the Circuit Judge is not found in the record in 928 or in this cause, we are not transgressing the record further than Mr. Coke when we state that it is shown by the stenographic report of two stenographers (one employed by the appellants, and one by the appellees) of the hearing referred to that on such hearing for preliminary injunction the Act of 1853 was read to the Circuit Judge and commented on at length by one of the signers of this brief.

## As to Notice.

It is practically conceded in the Attorney-General's printed argument in No. 928 that the notice issued by the company did not comply with the law, though he inferentially claims that the notice may have been sufficient as to the articles specifically mentioned therein. As the tariffs issued on those articles were afterwards abolished, or largely amended without further notice, this qualification of the Attorney-General's general admission of the insufficiency of the notice is of little importance. It is urged by the appellants that notice was waived by appearance of the company, and they cite authorities to the effect that, where defendant appears without notice, in answer to a specific complaint filed in a court of justice, it is a waiver of service.

In *McIntyre vs. Lucker, 77 Texas, 529*, it is decided that this doctrine does not apply to special tribunals. Aside from this, we believe that it would never be held that by such an appearance as described in the bill of complaint the company could forever waive the right to any specific notice that the law required.

## Collateral Attack on the Tariffs.

It is urged by appellants that the decisions of the Commission formulated in their tariffs cannot be collaterally attacked. In answer to this, it is sufficient to submit three propositions:

First, this is not a collateral attack, but a suit, under Section 6 of the law, in a court of competent jurisdiction in Travis County. The final decree in this case, in

canceling the tariffs of the Commission, follows the language of Section 6. The action of the Circuit Judge in granting the original injunction is not before this Court; but, even if it were, it is conceded in the brief of Mr. Coke, for the appellants, that, if Section 5 of the act is unconstitutional, it was proper under the laws of Texas for a Judge in a suit, brought under Section 6 of the act, to grant a preliminary injunction.

Second, the doctrine of collateral attack is not applicable to the judgments of special tribunals, but only to the judgments of regular Courts. Mills on Eminent Domain, Section 322, one of the authorities relied on by the appellants, says: "Legislative provision prohibiting appeals would not preclude a resort to other methods for the correction of the findings where irregularity, mistake or fraud had intervened." No appeal is allowed from the action of the Commission, but merely an original suit.

Third, the tariffs of the Commission are attacked on the ground that they are illegal, unconstitutional and void. A void judgment, even of a Court of general jurisdiction, can be questioned collaterally.

## Due Process of Law.

It is asserted by appellants that proceedings in a regular court are not necessary to due process of law. In support of this statement they cite cases of taxation, eminent domain, assessments for public improvements (merely a species of taxation) and a few other cases, the principles of which are shown in the argument filed by the Gulf, Colorado and Santa Fe Railway, in No. 928, page 67, *et seq.*

In this character of cases in the particular instances such proceedings were due process of law before the adoption of the constitutional provision, and hence remained due process of law afterward. The mere fact that the Judges, in speaking with regard to that class of cases, have used the expression that due process of law does not require a court, is not authority for the proposition that in no case does due process of law require a court. If due process of law, generally speaking, does not require a court, then the Legislature can practically abolish the courts of the country by creating a variety of special tribunals with jurisdiction and authority to proceed by summary methods. If such instances of taxation, &c., are to be regarded as precedents for the extension of the jurisdiction of special commissions or tribunals over the rights of the citizen in other directions, it is yet submitted that they do not go to the extent of justifying a commission with the autocratic power of the Texas Railroad Commission. In the case of taxation, eminent domain, &c., the rights of the citizen are clearly defined by law, and the only jurisdiction vested in the assessor, boards or commissioners is the mere ascertaining of the facts; that is, the value of the property or damages thereto to be ascertained under specific rules of law, while here the Commission is not only granted power to ascertain the facts, but to make the law, and then to decide whether the law so made by them, as applied to the facts, is constitutional.

The statute gives no definition of a reasonable rate, and under it the Commission must first legislate by enacting what is a reasonable rate.

Second, it must ascertain the facts.

Third, under the operation of section five, it must

decide, at least for the time being, whether its rule of law as applied to the facts violates the Constitution.

In this country it has always been recognized that a citizen may litigate in the general Courts as to the extent to which under the law the authorities may tax his property or when or under what circumstances his property may be applied to a purported public use. Thus, while it may have been held that the finding of some special tribunal as to the value of property or damages to the same may be made final, it has always been the doctrine that the citizen is entitled to the proceedings of a regular Court on the question of whether the facts existed which authorized the appropriation of his property.

Thus, in *Mitchell vs. Harmony*, 13 Howard, 128, while it is clearly recognized that in time of war a military commander has the authority to summarily seize property for public use or to prevent the same from falling into the hands of the enemy, yet whether the facts which would authorize the exercise of this power existed, was a question subject to subsequent judicial inquiry.

The cases are numerous in this and other Courts where the citizen has had a trial in Court on the legality of taxes. A number of the cases cited in the Attorney-General's argument are decisions of the regular Courts holding that the necessary facts did not exist to authorize the appropriation of a citizen's property.

**The act combines in the Commission legislative, executive and judicial power contrary to the Texas Constitution.**

This question is elaborately argued in briefs on file in No. 928.

We may now add that the above statement of the powers of the Commission, which is, in accordance with the contention of the appellants, that they must first legislate as to what are reasonable rates, then ascertain the facts, and then judicially decide, at least for the time being, that the law prescribed by them is not unconstitutional, shows that, in these particulars, they are certainly vested with legislative and judicial power.

In answer to the appellant's claim that the Commission amendment to the Constitution authorized the Legislature to combine all the powers of the Government in the Commission, we refer the Court to 2 Meyers Texas Digest, 245, where it will be seen that the doctrine in opposition to implied repeals is nowhere more strongly maintained than in Texas. Under this rule the Commission amendment, when read in connection with Section 1, Article 2, of the Constitution of Texas, does not constitute an express permission to combine the three powers of government in the Commission. By the amendment the Legislature itself is required, in the exercise of the legislative function, to pass laws to regulate freight rates, &c., and to the further accomplishment of these objects it is authorized to provide and establish all requisite means and agencies invested with such powers as may be deemed adequate.

While it might be properly urged that possibly this

would constitute an implied exception to Section 1, Article 2, of the Constitution, which prohibits a union of the powers of government, we think it cannot be construed as an express exception which is required by the language of that article. On this point we content ourselves with reference to the opinion of ex-Judge ROBERTSON of the Supreme Court of Texas, to be found on page 64 of G. C. & S. F. argument in 928.

## The Invalidity of the Entire Act by Reason of Sections 5, 14 and 17.

Section 14 does not permit the reasonableness of the rates to be contested in suits by the State for penalties.

On the oral argument when this was suggested by Mr. Justice HARLAN, Mr. Coke stated that it had not been theretofore claimed that Section 14 precluded the railroads from raising the issue of reasonableness. We think, however, that an inspection of the opinion of the Circuit Judge will show that this question was considered by him. Now, if these sections be held unconstitutional and are stricken from the act, there will remain no method prescribed in the act for the enforcement of the rates established by the Commission. When, for a number of years past, wherever the Legislature of Texas has required a duty of any railway company, it has imposed a penalty for failing in its performance, and when such has been the case in respect to the legislation of Congress, will this Court believe that, with these sections out, the Legislature would have enacted the remainder of the law just as it would be without these sections?

## The Attorney-General's Views of Reasonable Rates.

The Attorney-General has indulged in quite an elaborate argument on this subject. It is our understanding of the rule in equity that where the Court may be aided in the decision of any question raised on demurrer by hearing the testimony, that the Chancellor will overrule the demurrer and hear evidence. Under this view it would seem that the Circuit Court properly overruled the demurrers of the appellants. If the Court is to go beyond the record at the suggestion of the Attorney-General and take judicial notice of the lands donated to the railway companies in Texas, it would be just to the railway companies at the same time to judically note the fact that these lands were of little value; that since these magnificent donations the State of Texas has sold thousands of acres at fifty cents per acre, the expense of surveying which the railroads have paid as a condition of their receiving land; the number of years that the stockholders of these companies have been without dividends on their investments, and the fact that these lands were required to be disposed of by the railroad companies in a limited time, and could not be held for future speculation; and the probable fact that their proceeds were used by the company in a struggle for existence; and the further fact that the construction of the railroads in Texas has enhanced the value of the lands of the State and her citizens to probably tenfold the value of the lands received by the companies.

The Attorney-General suggests the fact that in a suit by an individual the entire question of rates could not

be settled as a reason why the Courts should not exercise the power of protecting railway companies in their rights under the constitution. This objection could be obviated by some proceeding by the Attorney-General on behalf of the State, by mandamus or injunction to require the railway companies to charge reasonable rates or to refrain from charging unreasonable rates, where the whole question could be litigated in one suit under judicial machinery without detriment or injustice to any one. If the proper case were made, preliminary relief could be granted by the Chancellor, as was done at the suit of the complainants in these cases; or, under equity jurisprudence such a suit could be maintained by a few citizens on behalf of themselves and all others, or by some incorporated Chamber of Commerce. Proceedings of this character have frequently been had before the Interstate Commerce Commission.

Following the opinions of others, the Attorney-General suggests that the machinery of the courts is inadequate for ascertaining what are reasonable rates. Whatever may be the opinions of those who have had no actual experience, we think to the contrary, and believe that no tribunal could be devised more suitable for this purpose than a court of equity, and we think that an inspection of the record in these cases in the Circuit Court will verify this opinion. Whatever may be proper in the matter where the mere issue of reasonableness of rates is involved, we suggest that if the Legislature of Texas had declared on the face of the law that the commission should establish rates which would be sufficient only to pay the operating expenses of the roads or to pay one-half of the interest on their bonds; or if, without such legislative declaration, the

Commission had declared on the face of their tariffs that their rates were only sufficient for such purpose, this Court would not have hesitated to declare such action unconstitutional, and that it will not be prevented from so doing merely because the Commission or the Legislature have not frankly declared such to be the effect of their action, but the Court will look to the facts and ascertain that such is the effect, and afford the companies the protection they are entitled to.

It is not claimed by these appellees that rates should be established with reference only to the interest of the carrier, but if the Court will analyze the Attorney-General's argument on this subject and apply it to the facts of these records, which show that the rates of the railway companies were fair and just to the public, and that notwithstanding, without any just excuse therefor, they were arbitrarily reduced, that the Court will find that every test suggested by the Attorney-General for the reasonableness of the rates is answered in favor of the companies by the records.

If there are any facts not disclosed by the bills which the appellants consider material, under the chancery rules of pleading, such additional facts should have been introduced by the appellants by plea or answer. The appellees were certainly not required to go into the domain of imagination and conjure up all conceivable matter that the appellants at any time might think affected the question for the purpose of alleging the same in their bills.

The Attorney-General has no right on demurrer to introduce *aliunde* the record purported variations in the prices of products in Texas, etc., thus depriving the appellees of the opportunity of offering any facts which might qualify the supposed effect of such variations.

For aught the Court knows, the prices of articles consumed by the producers of Texas may have so declined that, notwithstanding the supposed decrease in the value of their products, they are now in better financial situation than ever before, while these records do show that there has been no material decrease in the cost of operation of the railroads involved. If in the opinion of the appellants these causes should be tried on matters and considerations *dehors* the present records, the utmost indulgence the appellants can claim would be permission to withdraw their demurrers and bring forward the authentic facts, etc., shown by the proofs in the Circuit Court. It was on the idea that questions of law only were to be considered, the unreasonableness of the Commission rates being practically conceded, as is plainly manifest by the appellants' motion to withdraw their answers when they said: "The purpose of this motion is to raise in a simple and direct manner *the questions of law* involved n thiis cause, and *it has no other object in view;*" that appellees, as shown by the record, consented to the granting of such motion.

Respectfully submitted,

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IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1893.

JOHN H. REAGAN ET AL.,
APPELLANTS,

*vs.*

THE FARMERS' LOAN & TRUST COMPANY AND THE GULF, COLORADO AND SANTA FE RAILWAY COMPANY,
APPELLEES.

No. 1170.

## Supplemental Brief for Gulf, Colorado and Santa Fe Railway Company.

GEO. R. PECK,
J. W. TERRY,
*of Counsel for Company.*

WASHINGTON, D. C.
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1894.

IN THE

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JOHN H. REAGAN ET AL.,
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v.
THE FARMERS' LOAN & TRUST CO., AND THE GULF, COLORADO & SANTA FE RAILWAY CO.,
APPELLEES.
No. 1170.

## SUPPLEMENTAL BRIEF FOR GULF, COLORADO & SANTA FÉ RAILWAY COMPANY.

Responsive to the statements and figures given at p. 2 and 3 of appellants' brief, and to aid the Court's correct understanding of the facts, it is respectfully submitted—

I.

The cost of permanent improvements was not charged to operating expenses. This will appear from examination of table (Rec. p. 32), incorporated in the original bill, covering the years 1887 to 1891, inclusive, as from the

company's detailed report to the State Commission for the years 1891 and 1892 (Exhibits "H" and "I," Rec. pp. 121, 127, 129, 131, 143, 149, 151, and 153).

II.

The suggestion that the rates established by the Commission and herein complained of increased the earnings of appellee is contradicted (1) by the positive allegations of the bill; (2) by the fact that its earnings largely increased year by year prior to the Commission's action, as shown by the table at p. 31 of the record submitted as part of the original bill; and (3) by the clear and detailed statement given by the amendment to the original bill (Rec. 96) and the amended cross-bill (Rec. 98–102). To all of which the attention of the Court is earnestly solicited.

Respectfully submitted.

GEO. R. PECK,
J. W. TERRY,
*of Counsel for Company.*